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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BRANDON MCCALL, Plaintiff and Respondent, v. MORRIS POLICH & PURDY et al., Defendants and Respondents; THE QUISENBERRY LAW FIRM, Objector and Appellant.	B239142 (Los Angeles County Super. Ct. No. BS121126)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed.

The Quisenberry Law Firm and John N. Quisenberry; Esner, Chang & Boyer and Stuart B. Esner, for Objector and Appellant.

Shenoi Koes LLP and Allan A. Shenoi, for Defendant and Respondent Shenoi Koes LLP.

Morris Polich & Purdy LLP, Richard H. Nakamura, Jr., and David J. Vendler, for Defendant and Respondent Morris Polich & Purdy LLP.

No appearance on behalf of Plaintiff and Respondent.

I. INTRODUCTION

This appeal involves a dispute over class action attorney fees. Two law firms, Morris Polich & Purdy LLP and Shenoi Koes LLP, were named as defendants in an arbitration proceeding. Brandon McCall, Barry Selbst, Kelly-Slate Diaz and Dani Reagan are the named plaintiffs of the salaried managers' subclass in the class action. They are likewise the plaintiffs in the arbitration proceeding. The parties refer to the salaried managers' subclass as the McCall subclass. Defendants had represented the entire class during part of the wage and hour class action. Opposing defendants in the attorney fee dispute is the Quisenberry Law Firm, which appeared through its principal, John N. Quisenberry. Mr. Quisenberry represented the McCall subclass during a portion of the class action. Mr. Quisenberry negotiated a settlement on the McCall subclass's behalf. For clarity's purpose, we will refer to Morris Polich & Purdy LLP and Shenoi Koes LLP as defendants and the Quisenberry Law Firm as Mr. Quisenberry.

The arbitrator ruled defendants were entitled to 65 percent of the $380,000 attorney's fees award. However, Mr. Quisenberry is not a party to any arbitration agreement relevant to this case. And although defendants were ordered to arbitrate with their former clients, Mr. Quisenberry was not. When defendants attempted to compel Mr. Quisenberry to participate in the arbitration, he successfully resisted their efforts. Mr. Quisenberry was not a party during the arbitration. Despite the fact that he was not a party to the arbitration, the arbitrator ruled Mr. Quisenberry was entitled to 35 percent of the $380,000 attorney fee award.

In post-arbitration confirmation proceedings, Judge Michelle R. Rosenblatt confirmed the 65 percent award in favor of defendants. Judge Rosenblatt entered judgment in defendants' favor for $270,000 which is 65 percent of the $380,000 attorney's fees. But Judge Rosenblatt corrected the arbitrator's award by deleting the 35 percent allocation to Mr. Quisenberry. We affirm because the arbitrator had no power to allocate fees in Mr. Quisenberry's favor. And Judge Rosenblatt had the authority to correct the award because the issue of Mr. Quisenberry's rights to fees was not part of the

"controversy submitted" to the arbitrator. (Code Civ. Proc.,[1] § 1286.2, subd. (a)(4); *Jones v. Humanscale Corp*. (2005) 130 Cal.App.4th 401, 405, 411-412; *Ikerd v. Warren T. Merrill & Sons* (1992) 9 Cal.App.4th 1833, 1837, 1842-1846.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A wage and hour dispute arose with employees of Labor Ready, Inc. In August 2004, the employees rejected the employer's $3.7 million settlement offer. On February 6, 2003, defendants filed a wage and hour class action on behalf of all of the employer's managers and salaried employees. (*Romer v. Labor Ready, Inc.* (Super. Ct. L.A. County, Feb. 6, 2003, No. BC289925.) On October 26, 2005, defendant substituted out of the case following a tentative ruling it had a conflict of interest. The conflict of interest arose because defendants were representing both the salaried managers and hourly workers. (We express no opinion as to whether any conflict of interest existed.) Mr. Quisenberry substituted in as counsel for the McCall subclass; the salaried managers. The hourly workers had separate counsel. On December 17, 2007, after a one-day mediation, Mr. Quisenberry successfully negotiated a settlement on behalf of the McCall subclass. Under the settlement, the employer agreed to pay attorney fees, exclusive of costs in an amount not exceeding 25 percent of the settlement amount.

On December 19, 2007, defendants filed a notice of lien in the wage and hour class action. The lien notice states in part, "[P]lease take notice that the law firms of Morris Polich & Purdy, LLP and Pierry Shenol, LLP hereby claimed contractual and equitable liens in presently unliquidated amounts on any sums recovered in these or any related actions, whether by settlement or judgment, that have been brought on behalf of present or former employees of Labor Ready, Inc. or any of its subsidiaries for payment

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[1] Unless otherwise stated, future statutory references are to the Code of Civil Procedure.

of overtime wages. Said lien is for legal services rendered and costs incurred by the two firms."

On September 15, 2008, Judge Anthony J. Mohr held a hearing. The purpose of the hearing is unclear. We wish to emphasize that what follows is a summary of what the attorneys said. No under oath showing was made at the September 15, 2008 hearing. During the hearing, defendants argued they were entitled to $525,000 in attorney fees based on their representation of their clients during the initial period of the lawsuit. As noted, defendant had substituted out of the wage and hour action on October 26, 2005. The employer's counsel explained that his client had initially made a $3.5 million settlement offer plus attorney fees. The employer's counsel argued that: during the time defendant was representing plaintiffs, the matter had been pursued on a nationwide basis; if the attorney fee issue was not resolved, then class member payments might be withheld; and this was because it did not want to become liable if the class member settlement amounts were subject to defendant's lien notice. Judge Mohr indicated that the settlement might not be approved because of defendants' lien notice. Defendants agreed they would not "claim any portion of the amount paid to the class" as attorney's fees. Defendants further agreed not to pursue the employer for any amount above the court awarded fees.

Judge Mohr then ruled that he would determine the amount of the total attorney fee award. But Judge Mohr declined to allocate the fees between defendants and Mr. Quisenberry. Judge Mohr indicated that the fee allocation issue could be argued between defendants and Mr. Quisenberry in a different forum. Judge Mohr awarded attorney fees in the amount of $380,000.

On October 17, 2008, Judge Mohr entered an order approving the class action settlement and disbursement of funds. The October 17, 2008 order awarded attorney fees as follows: "The Court hereby awards attorney's fees in the amount of $380,000, which is approximately 33 [percent] of the funds, to be distributed to the settlement class. There is a dispute between [defendants and Mr. Quisenberry] over how the award of the

attorney's fees is to be allocated, and the Court does not hereby resolve that dispute." Judgment on cost issues was reserved for further briefing.

On December 11, 2008, Judge Mohr issued an order awarding costs of $12,000 to Mr. Quisenberry. As part of the order, Judge Mohr rejected defendants' argument they were entitled to a cost award of $165,000. Judge Mohr noted that paragraph 8 of the stipulated settlement provided that the employer would not dispute payment of costs not exceeding 25 percent of the settlement amount. Paragraph 8 also provided that the term "class counsel" was defined in the stipulated settlement to mean Mr. Quisenberry. Judge Mohr wrote, "In other words, to the extent that the Joint Stipulation addresses the issue of costs, it only addresses costs to be paid to [Mr. Quisenberry], not [defendants]." Judge Mohr stated that defendants had not cited to any authority which allowed a cost award in their favor. However, in Judge Mohr's view, Mr. Quisenberry's entitlement to costs was based on the settlement agreement.

In November 2008, Mr. Quisenberry filed a motion entitled, "Motion for an order that [defendants'] conflict in interest precludes their right to recover costs and attorney fees." On January 27, 2009, Judge Mohr denied Mr. Quisenberry's motion to prevent defendants from receiving any attorney fees based on the previously mentioned conflict of interest. During the hearing, the parties discussed the issue of how to resolve their attorney fee dispute. Judge Mohr ordered a petition to arbitrate be filed within 30 days. However, Judge Mohr stated he was making the arbitration order on the assumption that he had jurisdiction to do so.

In July 2009, some of defendants' former clients, the McCall class, declined to arbitrate the matter by State Bar arbitration through the Los Angeles County Bar's Dispute Resolution Services. On August 25, 2009, Judge Mohr entered what he termed a "final order" regarding attorney fees. Judge Mohr's August 25, 2009 order states: the October 17, 2008 order awarded $380,000 in attorney fees; the October 17, 2008 order provides the defendants in the class action, Labor Rate, Inc. and Labor Ready Southwest, Inc., were not required to pay any additional attorney fees for the McCall subclass; the October 17, 2008 "Final Order" for the McCall subclass did not resolve the attorney fee

claims for defendants; the December 11, 2008 order awarded Mr. Quisenberry $12,000 in costs; and the December 11, 2008 order denied any cost award to defendants. The defendants in the class action were ordered to deposit $380,000 in an interest-bearing escrow account payable to Mr. Quisenberry and defendants. Judge Mohr's order continued: "Once [the defendants in the class action] deposit the $380,000 into the escrow account, the escrow agent will not disburse the funds until there is a court order confirming a binding arbitration award as a result of a binding arbitration between [the McCall class] representatives and [defendants] or a written agreement between and among [the McCall class, Mr. Quisenberry, and defendants] . . . regarding the allocation of the funds."

On October 5, 2009, the McCall class representatives, represented by David E. Parker of the law firm Parker Shumaker Mills LLP, filed a petition to compel defendants to arbitrate. The dispute, which the McCall class representatives sought to arbitrate, was as follows: "There is a controversy between the parties. [Defendants], formerly class counsel, were forced to abandon the case because of a conflict of interest. [The McCall class,] with the aid of [Mr. Quisenberry], ultimately participated in a settlement of a class action. [Defendants,] well knowing the court would refuse to award them fees, did not even bother to file an application for fees. [Defendants] did file an application for costs and it was rejected entirely by the court. Since then, [defendant] had demanded that [the McCall class representatives], who were class representatives with relatively small claims, pay them hundreds of thousands of dollars in fees and costs." Thus, the controversy involved whether defendants were entitled to attorney fees, and if so, how much. The petition to compel arbitration makes no reference to any of Mr. Quisenberry's rights to fees. Further, the points and authorities submitted by the McCall class representatives make no reference to Mr. Quisenberry. All of the declarations submitted in connection with the McCall class representatives' petition referred merely to defendants' failure to arbitrate.

The petition was based upon an arbitration clause in revised contingency fee contracts with defendants. The arbitration provision provides, "Client and Attorney agree

to arbitration of any disputes they may have concerning or arising out of or related to this agreement or relating to the representation accorded to Client by Attorney, in accordance with the terms set forth on Addendum A, hereto." The addendum states in part: "If any dispute between us cannot be resolved to our discussions with each other, then you and we agree that all such disputes shall be resolved through arbitration as hereinafter provided. This agreement is intended to apply to all disputes between us, whether over our fees (a 'fee dispute') or concerning any other matter relating to our services or conduct . . . ."

The arbitration petition was assigned to Judge Rosenblatt. Defendants filed a conditional opposition which argued that Mr. Quisenberry had to be included in the arbitration. Judge Rosenblatt granted the petition to compel arbitration filed by the McCall class representatives. But Judge Rosenblatt denied defendants' request to include Mr. Quisenberry in the arbitration. Judge Rosenblatt ruled Mr. Quisenberry was not a party to any arbitration agreement with defendants. Defendants' reconsideration motion was denied on February 1, 2010.

On February 16, 2010, defendants filed a petition to compel Mr. Quisenberry to participate in the attorney fee arbitration with the McCall class representatives. The grounds for defendants' petition to compel arbitration were: "The basis for the petition is that although [Mr. Quisenberry] is not a signatory to the written agreements containing the arbitration provision, under equity, principles of equitable estoppel, estoppel agency, ordinary contract principles, and the case law and authorities cited in the accompanying [points and authorities, Mr. Quisenberry's] claims are (a) founded in and inextricably intertwined with the underlying contractual obligations of the agreement containing the arbitration clause, (b) the underlying court ordered the entire matter to 'some arbitration' and [Mr. Quisenberry] was present at that hearing and is bound by that ruling, under principles of res judicata, collateral estoppel, and estoppel; and (c) because [Mr. Quisenberry] offered and sought enforcement of some provisions of the same contract, as long as it worked to [his] advantage, [he] must now bear the burden of the same contract's arbitration provisions."

On March 11, 2010, Judge Rosenblatt denied defendants' petition to compel Mr. Quisenberry to participate in the McCall class arbitration. Judge Rosenblatt's ruled: "[The] Court notes that there is a single fund pool for attorney's fees pursuant to Judge Mohr's order. The pending arbitration will determine how those fees will be apportioned. If [Mr. Quisenberry] refuses to participate in the arbitration, [he] will have little practical opportunity to provide input to the arbitrator."

On July 16, 2010, the McCall class representatives and defendants signed a stipulation that they were the only parties to the arbitration. The McCall class representatives argued to the arbitrator that defendants were entitled to no fees because: they failed to file a motion for fees; they voluntarily withdrew from the case; and all of their claims were barred by res judicata principles.

The arbitrator entered an award allocating 65 percent of the $380,000 attorney fee fund to defendants. In addition, the arbitrator awarded 35 percent of the $380,000 attorney fee pool to Mr. Quisenberry. As noted, Mr. Quisenberry was not a party to Judge Rosenblatt's order to arbitrate. The arbitrator ruled that defendant had a quantum meruit claim for the full $380,000 and that the parties had submitted various other sub-issues for determination. The arbitrator wrote, "The scope of this arbitration is to determine how the single fund pool of $380,000 in attorneys' fees will be apportioned between [defendants and Mr. Quisenberry]." The arbitrator relied upon Judge Mohr's final order dated August 25, 2009 and Judge Rosenblatt's March 12, 2010 ruling. The arbitrator noted: Mr. Quisenberry participated in arbitration as a witness and co-counsel the McCall class; defendants had submitted billing records and evidence as to time spent on the case; and Mr. Quisenberry, who was not a party to the arbitration, did not submit any records in the arbitration proceeding. The arbitrator issued an award based on a quantum meruit determination.

Defendants filed a petition to confirm the arbitration award. The McCall class representatives opposed the confirmation petition. The McCall class representatives filed a petition to vacate the award on the ground the arbitrator acted in excess of her powers. Judge Rosenblatt confirmed the award but corrected it to exclude a reference to a fee

award to Mr. Quisenberry in any amount. Judge Rosenblatt ruled that the arbitrator had made a jurisdictional error in awarding fees to Mr. Quisenberry. Judge Rosenblatt corrected the award to state: "The scope of this arbitration is to determine what portion of the single fund pool of $380,000 in attorneys' fees will be allocated to [defendants]." Judge Rosenblatt thus corrected the award to show a finding defendants were entitled to 65 percent of the fee award and struck the reference to Mr. Quisenberry. The January 3, 2012 judgment states, "The award of [the arbitrator] . . . as corrected by the Court on September 26, 2011, having been confirmed by order of this court on January 3, 2012, IT IS ADJUDGED that [defendants] are entitled to [sixty-five] percent (65%) of the $380,000 attorneys' fees in the amount of $247,000, and costs of this proceeding in the sum of $_____." Mr. Quisenberry filed a timely notice of appeal from the judgment correcting and confirming the arbitration award.

III. DISCUSSION

Mr. Quisenberry asserts the arbitrator did not have the power to allocate the $380,000 fee. We agree. An award may be vacated or corrected on the grounds specified in sections 1286.2.[2] (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33 ["[A]n

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[2] Section 1286.2 provides: "(a) Subject to Section 1286.4, the court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of

award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction)."]; *Oaktree Capital Management, L.P. v. Bernard* (2010) 182 Cal.App.4th 60, 68 ["[G]rounds for vacating an arbitrator's award are statutory and limited."].) In addition, an award may be vacated where an arbitrator commits clear legal error which denies a litigant a hearing on an unwaivable important statutory right. (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 669-670, 675-680; see *Comerica Bank v. Howsam* (2012) 208 Cal.App.4th 790, 817.) Furthermore, our Supreme Court has held that the general rule is that an arbitrator does not exceed his or her powers simply by erroneously deciding issues of law or fact. (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184; *Moshono v. Walsh* (2000) 22 Cal.4th 771, 775-777; *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 372-375.) An appellate court has explained the circumstances under which an arbitrator exceeds his or her powers as follows. "An arbitrator exceeds his powers when he acts without subject matter jurisdiction [citation], decides an issue that was not submitted to arbitration [citations], arbitrarily remakes the contract [citation], upholds an illegal contract [citation], issues an award that violates a well-defined public policy [citation], issues an award that violates a statutory right [citation], fashions a remedy that is not rationally related to the contract [citation], or selects a remedy not authorized by law [citations]. In other words, an arbitrator exceeds his powers when he acts in a manner not authorized by the contract or by law." (*Jordan v. Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 443; see also *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1000.)

Both the right and scope of arbitration are contractual matters. (§§ 1281, 1281.2; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061,

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timely demand to disqualify himself or herself as required by that provision. However, this subdivision does not apply to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives. [¶] (b) Petitions to vacate an arbitration award pursuant to Section 1285 are subject to the provisions of Section 128.7."

1069; *In re Tobacco Cases I* (2004) 124 Cal.App.4th 1095, 1104.) Although there is a strong federal and state public policy in favor of arbitration, there is no public policy favoring arbitration of disputes, which parties have not agreed to arbitrate. (*Granite Rock Co. v. International Brotherhood of Teamsters* (2010) 561 U.S.___, ___ [130 S.Ct. 2847, 2856, 2859-2860]; *Freeman* v. *State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 481.) As the United States Supreme Court has held: "It goes without saying that a contract cannot bind a nonparty." (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294; see *Will-Drill Resources, Inc. v. Samson Resources Co.* (5th Cir. 2003) 352 F.3d 211, 217.) As our Supreme Court has explained: "'[T]he policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.' [Citations.]" (*Victoria v. Superior Court* (1985) 40 Cal.3d 734, 739; accord *Freeman v. State Farm Mut. Auto Ins. Co.*, *supra*, 14 Cal.3d at p. 481.) Furthermore, subject to exceptions not applicable here, an arbitrator lacks power to determine the rights and obligations of one who is not a signatory to the arbitration agreement. (*American Builder's Assn. v. Au-Yang* (1990) 226 Cal.App.3d 170, 179; *Unimart v. Superior Court* (1969) 1 Cal.App.3d 1039, 1045.)

Here, in the view of the arbitrator, there were two controversies concerning defendants' rights to the $380,000 fund. In the arbitrator's view, the first issue involves defendant's quantum meruit claim. The second dispute, according to the arbitrator, involved allocation of the $380,000 fund. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 792, *Oliver v. Campbell* (1954) 43 Cal.2d 298, 304; *Rus, Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal.App.4th 656, 671.)

The first issue identified by the arbitrator was the amount of fees earned by defendants. That issue was squarely within Judge Rosenblatt's December 2, 2009 order granting the McCall class's petition to compel arbitration. The fee dispute was subject to the arbitration provision between defendants and the McCall class. And Mr. Quisenberry has failed to identify any grounds for vacating the arbitrator's determination defendants were entitled to 65 percent of the $380,000 fund. Thus, the arbitrator's award in that respect must be affirmed.

The second issue identified by the arbitrator was Mr. Quisenberry's rights to a portion of the $380,000 fund. However, on March 11, 2010, Judge Rosenblatt ruled Mr. Quisenberry could not be compelled to arbitrate. Further, there was no arbitration clause which could compel Mr. Quisenberry to arbitrate any dispute he had with the McCall class or defendants. Thus, the arbitrator had no power to adjudicate Mr. Quisenberry's rights to any portion of the $380,000 fund. The award's allocation of any money to Mr. Quisenberry was in excess of the arbitrator's powers. (§ 1286.2, subd. (a)(4); *Ikerd v. Warren T. Merrill & Sons*, *supra*, 9 Cal.App.4th at pp. 1837, 1842-1846.)

Section 1286.2, subdivision (a)(4) requires that an award which is beyond an arbitrator's powers be vacated so long as it "cannot be corrected without affecting the merits of the decision upon the controversy submitted" for arbitration. Here, Judge Rosenblatt apparently concluded that the award was in excess of the arbitrator's powers but was correctable. We agree with her analysis. Utilizing the language of section 1286.2, subdivision (a)(4), the "controversy submitted" related solely to defendant's rights to fees, if any. The "controversy submitted" to the arbitrator had nothing to do with Mr. Quisenberry's rights or any allocation of funds.

This case is akin to that confronted by our colleagues in Division Three of this appellate district in the case of *Ikerd v. Warren T. Merrill & Sons*, *supra*, 9 Cal.App.4th at pages 1837 and 1842-1846. (See Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2011) ¶ 5:505.2, p. 5-351 (rev. # 1, 2010).) In *Ikerd*, an award was entered against a corporation and one of its officers. There was an arbitration agreement between the corporation and the plaintiff. (*Id.* at p. 1838, fn. 2.) But there was no arbitration agreement between the corporate officer and the plaintiff. The arbitrator entered an award against both the corporation and the corporate officer. The corporate officer participated in the proceedings and even filed a brief. The Court of Appeal concluded that the arbitrator had no jurisdiction over the corporate officer: "As Merrill was never a party to the arbitration proceedings, we must also reject [the plaintiff's] claim that by his acts of participating as a witness or by the filing of the legal brief there was a waiver of his right to object to the imposition of jurisdiction over him.

If he was not formally made a party and, as we hold, these acts did not constitute a general appearance, then there is no basis for a waiver [of the right to assert the arbitrator had no jurisdiction over him]." The Court of Appeal upheld the award against the corporation. But the Court of Appeal corrected the award to delete any reference to the corporate officer. (*Id.* at pp. 1844-1845.)

In *Jones v. Humanscale Corp.*, *supra*, 130 Cal.App.4th at pages 405, 411-412, the arbitration award required an employee to share in the expenses of an arbitration with his employer. The division of arbitrator expenses violated the holding of our Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 110-111, abrogated in part by *A T & T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740. The trial court *vacated the entire award* in part because of the improper division of arbitration expenses. Our colleague, Associate Justice William Rylaarsdam explained that the award could be corrected: "The question then is whether the trial court properly vacated the entire award rather than merely correcting it. A court may 'correct the award and confirm it as corrected if the court determines that: [¶] . . . [¶] . . . . The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted . . . .' ([] § 1286.6, subd. (b); see *DiMarco v. Chaney* (1995) 31 Cal.App.4th 1809, 1815 [although arbitrator exceeded powers by failing to award prevailing party attorney fees and costs, 'error was subject to correction' under § 1286.6].) A correction of the award's division of the arbitration fees and expenses will not affect the arbitrator's findings on the merits of the substantive issues." (*Jones v. Humanscale Corp.*, *supra*, 130 Cal.App.4th at p. 412.) The foregoing analysis is consistent with results reached in Federal Arbitration Act litigation when an arbitrator exceeds his or her powers. (9 U.S.C. § 11(b); *Offshore Marine Towing v. MR23* (11th Cir. 2005) 412 F.3d 1254, 1256-1258; *Davis v. Prudential Securities, Inc.* (11th Cir. 1995) 59 F.3d 1186, 1194-1196.)

Similarly, in our case Mr. Quisenberry: was not a party to the arbitration agreements with the McCall class; was not ordered to arbitrate with the McCall class; and did not participate as a party in the arbitration. The sole issue before the arbitrator was

defendants' rights to compensation from the McCall class. The maximum recovery was $380,000 as specified by Judge Mohr. Thus, the "controversy submitted" within the meaning of section 1286.2, subdivision (a)(4) was defendants' rights and those of the McCall class. Section 1286.2, subdivision (a)(4) allowed Judge Rosenblatt to correct the award so long as the merits of the "controversy submitted" pursuant to her order to arbitrate were unaffected. The merits of the "controversy submitted" to the arbitrator, defendants' rights and those of the McCall class, were unaffected by Judge Rosenblatt's correction. No error occurred when Judge Rosenblatt corrected the award and entered judgment.

Two additional points warrant comment. First, Mr. Quisenberry argues he is entitled to the entirety of the $380,000 in fees because that was what was ordered in a joint stipulation with the McCall class. Mr. Quisenberry relies on the language in the December 11, 2008 cost order signed by Judge Mohr. In the December 11, 2008 cost order, Judge Mohr wrote: "Paragraph 8 of the Joint Stipulation specifically states that 'Labor Ready will not dispute the payment of fees, exclusive of costs, to Class Counsel in an amount not exceeding [twenty-five] percent . . . of the settlement amount. . . . Class counsel shall be paid attorneys' fees and costs within (20) days of the Effective Date of this Settlement Agreement.' . . . The term 'Class Counsel' is specifically defined in the Joint Stipulation to mean [Mr. Quisenberry]. In other words, to the extent that the Joint Stipulation addresses the issue of costs, it only addresses costs to be paid to [Mr. Quisenberry], not [defendants]."

However, Judge Mohr repeatedly made clear that he was not adjudicating how the $380,000 attorney fees were to be distributed. Judge Mohr never ruled on the effect of defendant's December 18, 2007 lien notice. On September 15, 2008, Judge Mohr expressly stated he would not decide the issue of the allocation of fees between Mr. Quisenberry and defendants. On October 17, 2008, Judge Mohr's final order approving the settlement states in part: "There is a dispute between [defendants] and [Mr. Quisenberry] over how the award of attorney's fees is to be allocated, and the Court does not hereby resolve that dispute." On January 27, 2009, Mr. Quisenberry's motion

that defendants, because of their prior conflict of interest, be barred from receiving any fees was denied by Judge Mohr. During the January 27, 2009 hearing, Judge Mohr ordered that an arbitration petition be filed within 30 days to resolve the dispute between defendants and Mr. Quisenberry. The reference in Judge Mohr's December 11, 2008 cost order to the settlement agreement does not provide a basis for vacating the arbitration award in its entirety.

Second, Mr. Quisenberry argues the award as corrected interferes with and constitutes an involuntary forfeiture of his property rights. Mr. Quisenberry could have filed suit to adjudicate his rights to the $380,000 fund set aside by Judge Mohr. And he could have instituted litigation and sought to bring all the interested parties into court pursuant to section 1281.2, subdivision (c).[3] (*Cronus Investments, Inc. v. Concierge Services (*2005) 35 Cal.4th 376, 383; *DMS Services, Inc. v. Superior Court* (2012) 205 Cal.App.4th 1346, 1358.) Or Mr. Quisenberry could have sought to stay the arbitration, something the McCall class would probably have agreed with, in order to resolve the dispute in the judicial forum. (*Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1100; *RN Solution, Inc. v. Catholic Healthcare West* (2008) 165 Cal.App.4th 1511, 1521.) Further, Mr. Quisenberry could have agreed to be part of the arbitration between the McCall class representatives and defendants. Or Mr. Quisenberry

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[3] Section 1281.2, subdivision (c) states in part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: . . . (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition."

could have appealed Judge Mohr's October 17, 2008 final order. Mr. Quisenberry's declined to opt for any of these courses of action to protect his rights.

V. DISPOSITION

The judgment confirming the arbitration award as corrected is affirmed. Defendants, Morris Polich & Purdy LLP and Shenoi Koes LLP, are awarded their costs on appeal from the objector, The Quisenberry Law Firm.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.